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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1185

LUCY M. SLEDGE, ET AL,

Petitioners

vs.

J. P. STEVENS & CO., INC.,

Respondent

On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT, J. P. STEVENS & CO., INC., IN OPPOSITION TO PETITION

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THE AREAS OF THE CASE AS TO WHICH THE PETITIONERS SEEK REVIEW

The Decree and the Orders of the District Court in this case included principally:

(1) A broad and permanent general injunction.

(2) A comprehensive program, "rigorous and specific" in nature, requiring a wide "array" of on-going affirmative actions on the part of the Respondent Company[1].

(3) A series of extreme, and apparently unprecedented, directives to the Respondent Company to

[1]Petition Appendix, pp. 30a, 31a, 43a.

bring about various prescribed mathematical ratios or quotas among its employees, shaped and determined according to race.

(4) A directive that back pay shall be awarded to members of the plaintiff class upon terms and conditions to be later prescribed by the Court[1].

These orders and requirements were left in effect by the Court of Appeals, except as to the mandatory racial ratios or quotas, which were rejected by the Court of Appeals. As to the other three categories of directives delineated above, the plaintiffs of course do not petition this Court for review.

With respect to the racial quotas, category "(3)" above, the District Court decreed such quotas on a variety of subjects, including the hiring of employees, their initial placement, their transfer and lay-off, their preferment and promotion, and their pay and earn-

[1]With regard to these orders and directives, it should be noted that the District Court, in denying a stay pending the Company's appeal to the Court of Appeals, commented as follows:—"This court is sympathetic with the defendant's position and is not without real apprehension that the implementation of its decree may in fact cause considerable hardship if not indeed disruption of the operation of the defendant's business, with the very real possibility that many of the members of the class sought to be protected by the decree as well as many innocent employees of the defendant may be adversely affected. The court's reading of the cases, however, has left it with the very definite impression that any relief short of that provided in the decree would not pass muster in the appellate courts at this time" (Joint Appendix in the Court of Appeals, p. 527).

ings, but the Court of Appeals, as the Petition concedes[1], rejected all quotas in the case. Yet, it is to be noted that the plaintiffs ask this Court to review only the appellate Court's reversal of "the hiring and initial assignment quotas".[2]

In addition to the principal categories of directives outlined above, there were other related or peripheral matters as to which the rulings in the District Court and in the Court of Appeals were as follows.

The District Court held that the Company's departmental seniority system, though applied "evenly to all races" and instituted and maintained "free from any discriminatory purpose", violated Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981. The Court of Appeals reversed this ruling[3]. The Petition requests review of that reversal[4].

In its Order permitting this case to proceed as a class action and defining the class, the District Court placed certain restrictions upon "all parties" and "their counsel" in regard to communications with class members or "potential" class members, without first obtaining the consent of the Court—such restrictions not to be applicable, however, to any "communica-

[1]Petition, pp. 12, 13, 14 and footnote 17.

[2]Petition, pp. 4, 14, 21. The phrases "hiring quotas" and "hiring and initial assignment quotas" are apparently used interchangeably in the Petition.

[3]Petition Appendix, pp. 19-21.

[4]Petition, pp. 4, 22-23.

tions between any attorney and his client, or a prospective client who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney[1]. The Court of appeals did not specifically discuss this directive. The Petition, however, states that it "was necessarily affirmed" by the Court of Appeals, and the Petitioners request review of such affirmance[2].

After issuing its Decree, and preliminary to entering upon the ascertainment of individual back pay entitlements, the District Court issued an Order for the mailing and posting of a notice to all class members, together with a form for the signifying of desire to claim back pay. The plaintiffs sought and obtained permission to take an interlocutory appeal from that Order. The Court of Appeals affirmed the Order. The Petition[3] requests review of that affirmance[4].

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[1]Petition Appendix, pp. 146a-147a.

[2]Petition, pp. 2-3, 15-17, 19-20.

[3]Petition, pp. 3-4, 8-11, 17-19, 20-21.

[4]To complete the picture of the rulings and appeals in the case, the following might also be noted. The District Court, in its Findings and Conclusions after trial, dismissed each and all of the named plaintiffs from the case—either because they had withdrawn from the case or had taken the witness stand but had failed to show any discrimination by the Respondent against themselves. The District Court ruled, however, that by reason of "an apparent anomaly in practice and procedure in employment discrimination class actions", the dismissal of all class representatives from the case did not prevent the case from continuing to move through the courts as a class action. That ruling, the Court of Appeals affirmed.

(This footnote is continued on page 5)

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The Request For Review As To the Court Of Appeals' Reversal Of Racial Hiring Quotas

With regard to the Petitioners' request for review of the appellate Court's disapproval of the mandatory racial hiring quotas imposed by the District Court, it is submitted that the presentation in behalf of this request for review is significantly unimpressive and indeed meager. The plaintiffs devote less attention to this central aspect of the case than to the miscellaneous subjects of their Petition.

The racial quota directive, as to which the Petitioners request review, was that in each calendar quarter, to whatever percentage of the white applicants for jobs the Company actually offers jobs, it must multiply that same percentage figure against all blacks who apply for jobs during that quarter, and

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(Continued from page 4)

Meanwhile, the class representatives, who had been dismissed after failing to prove any wrongful discrimination against themselves, individually appealed. The Court of Appeals reversed the District Court as to their individual dismissals from the case and declared them still individually entitled to make back pay claims in any future back pay proceeding. In so doing, however, the Court of Appeals entered upon a discussion as to what would be the Company's "burden" with respect to such claimants in such a proceeding —in which the Court of Appeals set forth observations which would seem to have been not only premature and dictum but also, as this Court has very recently specifically emphasized, an incorrect description of the employer's "burden" in such situation.

whatever number results from that process of multiplication, would represent the number of blacks to whom the Company *must* offer jobs during that period[1]. For example, under this directive, if 10 whites and 100 blacks apply for jobs, and if the Company offers jobs to 5 of the whites, then automatically it *must* offer jobs to 50 of the blacks—or to ten times more blacks than whites. Similarly, if one white applies and the Company offers him a job, then it must offer jobs to *all* blacks who apply, no matter how many.

The Respondent has been able to find no instance in which any appellate court has accepted or approved a directive for the hiring of employees according to this extraordinary mathematical racial formula.

Moreover, the amazing irony of the situation is that when this directive was issued, the Company already had, in the plants to which the case relates, a work force balanced between blacks and whites almost exactly as is the work force of this area—and had for years been hiring blacks at a rate much higher than their proportion in the work force of the area.

In addition to such being the statistical state of affairs at the time the District Court issued its Decree, that Court had already determined, in its Findings and Conclusions after trial of the case, that "the management of Stevens has not consciously or knowingly engaged in discriminatory employment practices, and there is no evidence of any specific overt employment practice which has operated to deprive blacks of equal employment opportunities"[1].

[1]Indeed, the directive went further and required that the Company should fulfill this process as to males and females separately—although there is no allegation whatever in this case supporting or permitting any order against the Company that differentiates as to sex.

In the light of these and similar facts and circumstances, the decision of the Court of Appeals was that in this case it did not need to consider "the ultimate question" of whether the imposition of racial quotas "is permissible as "an abstract issue", nor undertake to resolve "the troublesome questions of possible statutory and constitutional conflict inherent in the use of quotas"[2].

The Court pointed out that there is apparent universal agreement that racial ratios and quotas should not in any event be imposed by courts in the absence of "compelling need" therefor, nor where "effective relief can be granted without resort to this device"[3]. Here, said the Court, "the record on appeal itself refutes any contention that the requisite 'compelling circumstances' were present to justify this aspect of the Decree"[4]. The Court thereupon concluded "we find the hiring ratios to be inappropriate on the facts of this case"[5].

[1]Petition Appendix, p. 96a.

[2]Petition Appendix, pp. 37a, 42a.

[3]Petition Appendix, p. 36a.

[4]Petition Appendix, p. 38a.

[5]Petition Appendix, pp. 35a, 38a.

The Court of Appeals reasoned that upon consideration of "whether the discrimination to be remedied has been egregious, purposive or blatant", or upon consideration of "the effectiveness" of the employer's "own efforts to correct past inequities", or upon consideration of "whether other" relief granted in the case is "capable of redressing" the "prior discrimination"—upon none of these considerations, the appellate Court concluded, do the facts and circumstances of the case justify any such racial hiring ratios or quotas as were decreed by the District Court[1].

The Court pointed out that factors "which were found to have accounted for" statistical imbalance in the Company's "hiring process" during earlier years "are directly and sufficiently addressed by other provisions' of the District Courts Decree[2]. In its Opinion, the Court outlines at some length—though even so not exhaustively—the numerous and strict directives, other than quotas, for specific and continuing affirmative actions which the District Court's Decree requires of the Company[3]. "In the event", says the Court, "that the remedial measures which we have summarized do not appear to be accomplishing this goal, then, exercising the jurisdiction it has retained, the Court may, on a record of the particular weaknesses or deficiencies of the relief measures, consider modification of the decree and tailor it to address the problem areas"[4].

[1]Petition Appendix, pp. 37a-38a.

[2]Petition Appendix, p. 40a.

[3]Petition Appendix, pp. 40a-42a.

[4]Petition Appendix, p. 42a.

The Respondent recognizes, of course, that *Regents of the University of California vs. Allan Bakke*, — U. S. —, 57 L. Ed 2d 750 (1978) is not directly in point here. Nevertheless, the decision in that case potently confirms that this Court takes no favorable view of mandated formulae for racial ratios or quotas —and that, as the Court there emphasized, "racial and ethnic distinctions of any sort are inherently suspect". *Bakke*, 57 L. Ed 2d 750, 771.

It certainly does not seem likely that this Court, in the facts and circumstances presented by the present case, would consider reestablishing the extreme form of racial directive which has been here carefully weighed and rejected by the Court of Appeals.

The Request For Review As To The Court Of Appeals' Affirmance Of A Limited Supervision Of Class Communications

As has been hereinabove mentioned, the District Court, in its Order permitting this case to proceed as a class action and defining the class, included a paragraph requiring its consent to communications with class members or potential class members who were not named plaintiffs in the case[1].

As was stated in this restriction, it applied not merely to the plaintiffs and attorneys for the plaintiffs, but to "all parties hereto and their counsel"[2]. It exempted from its provisions, however, "communications between any attorney and his client, or a pro-

[1]Petition Appendix, pp. 146a-147a.

[2]Petition Appendix, p. 146a.

spective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney"[1].

Likewise the District Court, later in the proceedings, readily gave the plaintiffs and their attorneys permission to contact class members for purpose of "locating witnesses and obtaining trial testimony"[2]. Still further, upon the rendering of its Decree in the case, the District Court expressly provided that "counsel for plaintiffs, members of the class, the Union and the Special Master shall have the right to communicate with members of the class, to satisfy themselves as to compliance with this Decree"[3].

It is also to be noted that with respect to class actions, Rule 23(d) of the Federal Rules of Civil Procedure provides that:—"In the conduct of actions to which this rule applies, the court may make appropriate orders . . . (3) imposing conditions on the respective parties or on intervenors". The Petitioners broadly assert, however, that the District Court's Order regarding communications with class members invaded their constitutional rights.

Upon analysis, it will be seen that the decisions dealing with Court supervision of such communications are concerned mainly with the protection of First Amendment rights relative to the instituting of

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[1]Petition Appendix, p. 147a.

[2]Petition, p. 7.

[3]Petition Appendix, p. 131a.

litigations, prior to the certifying of a class action or defining of a class. After the latter stage has been reached however—as was the situation when the restrictive order here in question was issued—the authorities definitely recognize a trial court's legitimate interest in exercising such supervision as may be reasonable and needful to the management of these broad and complex class actions.

Neither *In Re Primus*, — U. S. —, 56 L. Ed 2d 417 (1978)—the latest case in this Court cited by the Petitioners and touching upon this subject—nor any of the other cases which the Petitioners refer to, contradict this. For example, when the *Rodgers* case, cited by the Petitioners, was first before the Third Circuit Court of Appeals, that Court emphasized the "undoubted power" of the trial court "to impose some restrictions on First Amendment rights during the course of judicial proceedings" after a "favorable class action determination". In that case the Court further said:

> "Once a favorable class action determination has been made, the justification for the Rule is said to flow from the court's power, and even duty, to prevent the Rule 23 procedural device from being misused by communications which are false or misleading".
>
> *Rodgers vs. United States Steel Corp.*, 508 F. 2d 152, 162 (3rd Cir., 1976)

The Request For Review As To The Court Of Appeals' Affirmance Of Steps Preliminary To Back Pay Proceedings

This request for review relates to an Order issued by the District Court as it approached the hearing and determination of individual back pay claims. The Court reasonably needed to inform class members that it was going to hear such individual claims, and it reasonably needed to know who were the individuals who would be making such claims.

Therefore the District Court directed that there be mailed to each member of the class, and also posted at the plants involved, a notice worded by the Court and briefly explaining the subject of back pay rights in the case, together with a claim form on which each class member should answer "Yes" or "No" as to whether he or she wished to make claim and would be willing to appear and respond to questioning regarding such claim.

The Petition terms this procedure "nonfunctional", or "functionless"[1], though it obviously serves a very natural and reasonable purpose. It is a procedural step authorized by the Federal Rules of Civil Procedure.

> "In the conduct of actions to which this rule applies, the court may make appropriate orders: . . .
>
> "(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members . . . of the opportunity of members . . . to . . . present claims . . ."
>
> Federal Rules of Civil Procedure, Rule 23(d)(2)

[1]Petition, pp. 18-19.

The Petition characterizes "language" of the claim form prescribed by the Court as "misleading and confusing"[1]. On the contrary, it is submitted that this form is about as simple as could be[2]. Indeed it is not essentially different from what the plaintiffs requested in a Motion to Amend[3].

The Petition contends that the Court's form, on which individual class members would state whether they do or do not wish to claim back pay, is an "opt-in" requirement and as such is "a clear abuse of discretion"[4]. As "authority" for this, the Petition cites the "Manual for Complex Litigation, §1.45". Quite to the contrary, however, this Manual speaks approvingly of such procedure and requirement at the back pay stage with which the District Court was here dealing.

> "It appears that a proof of claim to be submitted after a judgment establishing liability is most often the surest way of utilizing the procedure so that it does not confuse or prejudice absent class members

[1]Petition, p. 10.

[2]Petition Appendix, pp. 140a-141a.

[3]Petition Appendix, p. 10.

[4]Petition, pp. 18-19.

or require proof which cannot be obtained at the outset of a case. 'More often . . . the courts await the adjudication of the liability issue before adopting procedures to notify class members to come forward and assert their claims' ".

Manual For Complex Litigation,
§1.45, p. 38

"A court may . . . give . . . an additional notice, under [Rule 23] (d)(2) to class members who do not opt out, and require them to take some affirmative action as a condition of ultimate recovery".

3B Moore's *Federal Practice,*
¶23.55 at 23-1161 (2d Ed., 1969)

"On the other hand, once defendant's liability is established, the court may be justified in ordering a second notice sent pursuant to Rule 23(d)(2) requiring class members to file statements of their claims and barring those not presented at that time".

7A Wright & Miller, *Federal Practice and Procedure,* §1787, p. 159

The authorities are overwhelmingly to the effect that a notice to class members—and a requirement that the individual class member declare himself a claimant and respond to relevant questioning in order to be considered for monetary award—is lawful and reasonable and appropriate. *Robinson vs. Union Carbide Corp.* 538 F. 2d 652 (5th Cir., 1976) and 544 F. 2d 1258 (5th Cir., 1977), cert. denied, 434 U. S. 822 (1977); *Bing vs. Roadway, Inc.,* 485 F. 2d 441, 448-

449 (5th Cir., 1973); *Thornton vs. East Texas Motor Freight,* 497 F. 2d 416, 422-423 (6th Cir., 1974).

The Court of Appeals therefore rightly held that there was "no reversible error in the District Court's imposition of the claim-filing requirement prefatory to the proceedings for back pay relief"[1]. The Court concluded that "we find the filing proviso to be an appropriate first step toward the eventual assessment and resolution of the compensation claims"[2].

The Request For Review As To The Court Of Appeals' Reversal Of the District Court's Ruling Regarding Departmental Seniority

With regard to the Respondent's "departmental seniority" system, the Court of Appeals noted that "the plaintiffs here concede that they do not challenge the bona fides" of this system and that it applied "evenly to all races" and was established and "maintained free from any discriminatory purpose"[3]. Therefore, said the Court, "the conclusion that the departmental seniority system violated Title VII must be reversed", and that "for the same reason, the conclusion that it violated §1981 must also be set aside"[4].

The Court of Appeals pointed out that such reversals were required by Section 703(h) of Title VII[5], as

[1]Petition Appendix, p. 49a.

[2]Petition Appendix, p. 49a.

[3]Petition Appendix, p. 15a.

[4]Petition Appendix, p. 15a.

[5]42 U.S.C. §2000e-2(h).

interpreted and applied by the Fourth Circuit Court of Appeals in *Johnson vs. Ryder Truck Lines, Inc.*, 575 F. 2d 471 (4th Cir., 1978) and by this Court in *International Brotherhood of Teamsters vs. United States*, 431 U. S. 324, 343-357 (1977)—both of which were decided after the District Court declared the Respondent's departmental seniority system to be invalid.

Apart from the correctness of this ruling by the Court of Appeals, there is in any event no occasion for this Court to consider reviewing this matter—for the subject is largely academic in this case. As the Respondent emphasized in the Court of Appeals, there is essentially no contest between the parties with respect to the Respondent's departmental seniority system. This comes about by reason of the following circumstances.

At the same plants which are here involved, the employees are represented by the Union which is Intervenor in this case. At all of its other plants, the Respondent Company in recent years established a job posting and job bidding system on the basis of plant-wide seniority, as distinguished from departmental seniority—which applies to all employees and eliminates the departmental seniority characteristics that the District Court in the present case found to be unlawful.

The Respondent has informed the plaintiffs and the Union that it is willing at any time to make the same change at these plants. The Respondent is under legal obligation, however, to bargain with the Union regarding such change, and is doing so, but the Union has not yet seen fit to agree to the change. Nevertheless, if the District Court's Order invalidating the departmental seniority system had not been reversed, it would have become the superior duty of the Company to obey that Order with regard to the black employees in these plants.

In any event, since the Company's position is that of offering to establish in these plants, as it has already done in all its other plants, a plant-wide seniority system—though no court order now requires it to do so—the situation would certainly not seem to be one in which this Court should consider burdening itself to review the validity of the departmental seniority system.

CONCLUSION

Upon all of the foregoing the Respondent respectfully submits that a Writ of Certiorari should not be issued in this case.

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